

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DEMETROIS TERRELL DIXSON,

Petitioner,

v.

SECRETARY, Department of  
Corrections and Rehabilitation,

Respondent.

No. 14-05069 CW

ORDER GRANTING  
MOTION TO DISMISS  
THE PETITION AS  
UNTIMELY

\_\_\_\_\_/

In March 2006, an Alameda County jury convicted Petitioner Demetrois Dixson of multiple felonies, including forcible sexual offenses against his girlfriend, Amitha.<sup>1</sup> These charges included forcible rape, unlawful sexual intercourse with a minor, battery with serious bodily injury, corporal injury to a cohabitant, forcible sodomy, and forcible oral copulation. Petitioner has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his state criminal conviction and asserting that he is actually innocent. Respondent has filed a motion to

<sup>1</sup> Amitha is referred to as "A." in some documents in the record, "Amitha H." in others and by her full name in still others. This order will refer to her as "Amitha."

1 dismiss the petition, arguing that it is procedurally defaulted  
2 and untimely. Petitioner has filed a reply. Having considered  
3 the parties' papers the Court finds that the habeas petition is  
4 untimely and GRANTS Respondent's motion to dismiss. Because the  
5 petition is untimely, the Court does not reach Respondent's  
6 argument that Petitioner's claims are procedurally defaulted.

#### 7 BACKGROUND

8  
9 The following background facts, including footnotes, are  
10 taken from the California Court of Appeal decision denying  
11 Petitioner's direct appeal. All citations are to the California  
12 Penal Code.

#### 13 Prosecution Evidence

14 A. grew up in Lancaster, California, a small town  
15 in Los Angeles County. Her parents, who were from Sri  
16 Lanka, were very protective of her and did not allow  
17 her to date in high school. In August 2004, when she  
18 was 17 years old, A. began her freshman year at the  
University of California, Berkeley, where she lived in  
a dorm room. Her close friend Anita Suri also enrolled  
at Berkeley.

19 One afternoon in late September 2004, A. was  
20 approached by appellant in a campus yogurt shop. They  
21 spoke briefly and exchanged telephone numbers.  
Appellant was 28 years old at the time, although he  
told A. he was 21. He called her a few minutes after  
leaving the shop and A. agreed to join him for dinner.

22 Appellant bought a pizza and lemonade at the  
23 supermarket and then drove A. to a sparsely furnished  
apartment in Fairfield. After they finished the pizza,  
24 appellant kissed A., who felt nervous but did not say  
anything. He tried to take her pants off, but she told  
25 him she didn't want to do anything. Appellant removed  
her pants, pushed her legs open and forced her to have  
26 unprotected intercourse. He refused to drive her home  
when he had finished, claiming to be tired. The next  
27 morning, he wanted to have sex again, but A. told him  
she needed to get to class. He drove her back to  
28 Berkeley. A. did not believe she had been raped because

1 appellant had not used violence, and she was too  
2 embarrassed to tell anyone what had happened. (Counts  
3 1 & 2, forcible rape (§ 261, subd. (a)(2)) and unlawful  
4 intercourse with a minor (§ 261.5, subd. (c)).)

5 Appellant called A. and they saw each other again.  
6 They argued about whether appellant had raped her on  
7 their first date, but A. continued to see appellant  
8 because he was nice to her in other ways. She did not  
9 tell her parents about the relationship because they  
10 would have disapproved. Over time, appellant became  
11 abusive, and A. became estranged from her friends.

12 In October 2004, A. met appellant in San Diego.  
13 After an argument in a restaurant about how little she  
14 ate, he left her in the restaurant and drove away. He  
15 later returned and told her he and some friends would  
16 rape her and leave her in a ditch. Later during the  
17 visit to San Diego, appellant poured a drink over A.  
18 and wrapped a pillow case around her neck so tightly  
19 she could not breathe. Once, while in a shopping mall  
20 in Fairfield, appellant checked the memory of A.'s cell  
21 phone and saw that her old boyfriend had called. He  
22 spat in her face and left her stranded at the mall;  
23 when he returned and discovered her talking on her  
24 phone to a friend he grabbed the phone and told the  
25 friend not to call A. again.

26 Shortly before Thanksgiving, A. learned she was  
27 pregnant. Appellant seemed happy at first, but after  
28 an argument told her to get an abortion. A. suffered a  
miscarriage a few days later. A. told appellant she  
wanted to break up, but he threatened her with violence  
so she continued to see him. Students in the dormitory  
sometimes heard A. cry as appellant yelled at her and  
threatened her. At least one student noticed bruises  
on A.'s neck, face and arms.

On December 21, 2004, appellant and A. argued  
about some charges appellant had run up on her cell  
phone. Appellant pushed and choked A., then grabbed  
one of her fingers and squeezed her cheeks for about 30  
seconds, until the inside of her cheeks were cut by her  
teeth. A. started to spit up blood and they continued  
to argue for about half an hour. The dormitory's  
resident director, Cora Gerdes, came to the door after  
another resident reported that someone was crying and  
yelling in A.'s room. Gerdes spoke privately with A.,  
who said she was crying because she was feeling very  
ill, but claimed not to need help. Appellant had told  
A. that if she ever reported him, he would come after  
her. (Count 3, battery with serious bodily injury (§  
243, subd. (d)).)

1 A. spent the winter break at her parents' house in  
2 Lancaster. Her jaw was still swollen from appellant's  
3 attack and the skin of her interior cheeks seemed to be  
4 infected. Her parents took her to see their family  
5 doctor, but she could not explain the injuries to him  
6 and said she might have caught mononucleosis. The  
7 doctor believed her symptoms were consistent with  
8 either mononucleosis or trauma.

9 Appellant called A. nearly every day over her  
10 break to threaten her and ask her for money. He told  
11 her once that if she didn't send money, he and his  
12 cousins would come to her house with a gun. Appellant  
13 also called A.'s mother and, using different names,  
14 demanded to know A.'s whereabouts. When she went to  
15 the airport to fly back to Berkeley, appellant picked  
16 her up and drove her to San Diego, causing her to miss  
17 class. She gave him money and got more from her  
18 parents.

19 After winter break, appellant began living in A.'s  
20 dorm room full time. A.'s roommate Jessica Chan saw  
21 appellant and A. argue several times. Once A. called  
22 the police to get appellant out of the room, but  
23 appellant hung up the phone. A. did enlist the campus  
24 police in helping her get appellant's things out of her  
25 room, but she did not tell them about the violence.  
26 Afterwards, appellant drove her around and yelled at  
27 her about contacting the police. He hit her and  
28 squeezed her forehead with his hands, but later  
apologized and put bandages on the cuts he had caused.

On January 25, 2005, A. took a handful of Tylenol  
pills because she "couldn't deal with it anymore."  
Appellant took her to the emergency room, where she  
said she had taken the pills because her stomach had  
been hurting. A nurse pulled A. aside, commented that  
appellant was very controlling, and asked whether she  
had taken the pills because of appellant.

On February 17, 2005, appellant became angry with  
A. when her friend Anita arrived to watch television  
while he was still in bed. He asked Anita to wait  
outside and squeezed A.'s cheeks until they were  
bleeding on the inside and she was choking on her own  
blood. He punched her in the leg and told her he hoped  
she couldn't walk. (Count 4, corporal injury on a  
cohabitant (§ 273.5, subd. (a)).)

After this incident, A. told Anita everything that  
had been going on. Anita did not call the police  
because A. wanted to handle it her own way. Later that  
month, appellant punched A. in the mouth and caused her  
lip to bleed after she told him she was going out with

1 Anita. When they stopped at a service station to get  
2 ice for her lip, he hit her again because she did not  
tell him the ice was melting.

3 On March 13, 2005, appellant dragged A. downstairs  
4 from her dorm room after he had to spend the night in  
5 his car because her roommate Jessica was working on a  
6 term paper. He hit her in the elevator, dragged her  
7 into the recycling room, and put his knee on her neck.  
8 When he had finished his attack, A. had scratches on  
9 her face and was bleeding. (Count 5, corporal injury  
10 on a cohabitant (§ 273.5, subd. (a)).)

11 Appellant stayed in A.'s dorm room while A. went  
12 home to Lancaster on spring break. He looked on her  
13 computer and saw she had been corresponding by email  
14 with her friend Justin Johnson. Appellant called A.  
15 and yelled at her for talking to another man and then  
16 drove to Lancaster and began leaving messages on her  
17 cell phone. Appellant told her that if she did not  
18 meet him he would crash into her parents' car or throw  
19 a brick through their window. A. agreed to meet  
20 appellant at a motel.

21 When she arrived at the motel, appellant told A.  
22 to get into his car, where he threw down copies of A.'s  
23 email messages with Justin and yelled at her for  
24 telling other people their business. He hit her in the  
25 mouth, causing it to bleed. When she refused to give  
26 him Justin's phone number, he grabbed her leg and  
27 squeezed it, stating he would rip her flesh out.  
28 Appellant drove back to the motel and told A. to go  
into the room, which she did, because she knew he would  
follow her if she did not. Inside the room, appellant  
hit her on the face and told her she "better give him  
some to calm him down." A. took off her clothes  
because she was afraid. She was crying and her mouth  
was bleeding, but appellant forced her to orally  
copulate him. After that, he raped her, sodomized her  
and urinated on her, hitting her in the face with an  
open hand. Appellant hit her again on the side of her  
head as she was getting dressed to leave. (Counts 6, 7  
& 8, forcible rape (§ 261, subd. (a)(2)), forcible  
sodomy (§ 286, subd. (c)(2)), forcible oral copulation  
(§ 288a, subd. (c)(2)).) A. went to dinner with Anita  
and another friend that night, both of whom urged her  
to report appellant to the police. She told them she  
wanted to handle things her way, without angering  
appellant.

27 In late March, A. learned she was pregnant again  
28 and told appellant. He pushed her into a closet during  
an argument on that same night. While driving her

1 around the next day, he punched her in the face when  
2 she could not remember something he had said. A.  
3 emailed her friend Justin and asked to talk, but when  
4 he tried to call her appellant took the phone away and  
5 told him to stop calling. Appellant repeatedly  
6 threatened Justin and told him to stay away from A.

7 On April 1, 2005, appellant took a trip to San  
8 Diego. Before he left, he and A. argued because he  
9 wanted to have sex and she said she did not because her  
10 stomach hurt. Appellant promised to go slowly and not  
11 hurt her, but when they had sex A. cried the whole time  
12 and said he was hurting her. (Count 9, forcible rape  
13 (§ 261, subd. (a)(2)).)

14 On April 5, 2005, A. met with resident director  
15 Gerdes, who wanted to ask her about reports that  
16 someone else was living in her dorm room. A. told  
17 Gerdes about appellant's violent conduct, but said she  
18 did not want to go to the police without first learning  
19 how long appellant could be held in custody. Gerdes  
20 notified security in the dormitory that appellant was  
21 no longer welcome there.

22 Appellant checked A.'s voicemail and learned of  
23 her meeting with Gerdes. He called her from San Diego  
24 and said he was going to fly to Berkeley that night,  
25 punch her in the face and stomach, and give her a  
26 "Demetrois abortion." A. told Gerdes about the call  
27 and spent the night with Anita. Appellant flew back to  
28 the Oakland airport that same evening, where he called  
A. and told her to pick him up. A. refused to pick him  
up. (Count 10, criminal threats (§ 422).)

Appellant went to A.'s dormitory that evening and  
was told by Gerdes to leave. He responded that A. was  
his girlfriend, that she was pregnant with his child,  
and that they were just having a hard time. Gerdes  
overheard appellant yelling at A. over the phone.  
Appellant called A.'s parents in Lancaster later that  
same evening and told them he and A. were in love, that  
A. was pregnant, and that she was afraid to tell them  
of the relationship because she knew they would not  
approve.

Appellant returned to A.'s dorm room the next  
morning, where Anita answered the door while A.  
remained inside. Appellant spoke to Anita for several  
hours in the lounge, telling her that everything was  
unfair and he wanted to work things out with A. Anita  
told appellant she would talk to A. on his behalf.  
With Gerdes's help, the girls sneaked out of the dorm  
room and met A.'s mother, who had arrived in Berkeley  
that morning.



1 A. reported appellant to the police and obtained a  
2 restraining order. Appellant was arrested and was  
3 served with the restraining order on April 12, 2005,  
4 while he was in jail. Appellant called A. on April 13  
5 and asked her to drop the charges. A. told him he  
6 should not be calling her. He telephoned her several  
7 more times that day while she was with her mother and  
8 two police officers. One of the officers got on the  
9 telephone and told appellant that he had a restraining  
10 order and should not be contacting A. Appellant said  
11 he was confused because she had called him. (Counts  
12 11, 12 & 13, misdemeanor disobeying a domestic  
13 relations restraining order (§ 273.6, subd. (a)).)

8 On April 16, 2005, Anita received about 10  
9 telephone calls from appellant, in which he told her he  
10 was innocent and she was the only one who could talk to  
11 A. about changing things. Anita pretended to agree  
12 with appellant because she was afraid of him. A woman  
13 called her from a blocked telephone number a few  
14 minutes later and said, "Demetrois knew where [Anita]  
15 lived in Berkeley and at home." Appellant called again  
16 and told Anita he was recording their conversation;  
17 Anita again pretended to agree with appellant about his  
18 version of various events because she was afraid of  
19 him. (Count 14, attempting to dissuade a witness (§  
20 136.1, subd. (a)(2)).)

16 Also on April 16, appellant left messages on A.'s  
17 voice mail in which he played portions of his  
18 conversation with Anita and tried to discourage her  
19 from prosecuting the case. He did not stop calling her  
20 until June. (Count 15, dissuading a witness from  
21 prosecuting a crime (§ 136.1, subd. (b)(2)), and count  
22 16, knowingly violating protective order (§ 166, subd.  
23 (c)(1)).)

20 A. was not the first woman appellant had  
21 victimized during an intimate relationship. In 2000,  
22 he met L.D.<sup>2</sup> in a shopping mall and they began dating.  
23 A month or so after they met, he began hitting her  
24 regularly. He once put a gun to her head and would  
25 frequently squeeze her mouth so hard that the inside of  
26 her mouth and jaw would be sore. Despite the abuse,  
27 the couple married. The abuse escalated and in 2003,  
28 L. learned she was pregnant. Appellant continued to  
hit her during the pregnancy and threatened to do a

---

<sup>2</sup> L.D. and Jamie A. were called as witnesses by the  
prosecution and testified to prior acts of domestic violence  
admissible under Evidence Code section 1109.

1 number of violent acts to cause a miscarriage. L. gave  
2 birth and, although she tried to give appellant a  
3 chance, the abuse continued. She eventually left  
4 appellant in early 2004.

5 Appellant met Jamie A. in February 2004 when he  
6 introduced himself to her in a parking lot. They had  
7 moved in together within a few weeks and she continued  
8 to see him until October 2004. About a month into the  
9 relationship, appellant became abusive. He threw a  
10 speaker at her during an argument, cutting her lip, and  
11 once grabbed her cheeks and squeezed so hard that her  
12 teeth cut the inside of her mouth. Jamie finally broke  
13 off the relationship and reported her car stolen when  
14 appellant refused to return it to her. By that time,  
15 appellant was dating A., who posted bail when appellant  
16 was caught driving Jamie's car and was arrested for  
17 driving a stolen vehicle.

18 According to Dr. Linda Barnard, an expert on  
19 domestic violence, one of the misconceptions about a  
20 domestic violence situation is that women who don't  
21 leave the relationship either enjoy it or are  
22 exaggerating the extent of the abuse. Domestic  
23 violence is about power and control, and the  
24 perpetrator usually denies responsibility and suggests  
25 instead that the victim is the one to blame. The  
26 typical cycle of abuse involves tension building, then  
27 verbal abuse, then pushing or shoving, followed by more  
28 acute physical, sexual or emotional abuse. After this  
apex of conflict, there is a honeymoon period where the  
abuser apologizes. This is especially damaging for the  
victim, who comes to deny her own reality. Many  
victims of domestic violence exhibit the symptoms of  
post-traumatic stress disorder, which places them in a  
numbed emotional state. They also lie about or  
minimize the abuse because of their "traumatic bond"  
with the abuser and because they are embarrassed about  
submitting to such treatment.

#### Defense Evidence

Appellant testified on his own behalf and denied  
that he was ever violent with A., Jamie or L., nor did  
he ever force A. to have sex. A. was very jealous  
about other women, and he thought she might be lying  
about her child being his because she wanted to get him  
to assume the role of the baby's father. Appellant did  
not read the restraining order A. obtained because he  
was frustrated and did not know what was going on. In  
his view, his relationship with A. had been "perfect."



1 People v. Dixon, 2008 WL 1813175, \*1-\*6 (Cal. Ct. App.). In  
2 2006, Petitioner was convicted of three counts of forcible rape,  
3 one count of unlawful sexual intercourse with a minor, one count  
4 of battery with serious bodily injury, two counts of corporal  
5 injury to a cohabitant, one count of forcible sodomy, one count of  
6 forcible oral copulation, one count of making criminal threats,  
7 three counts of disobeying a domestic relations court order, one  
8 count of attempting to dissuade a witness from appearing in court,  
9 one count of dissuading a witness from assisting the prosecution  
10 and one count of disobeying a stay away order. On April 22, 2008,  
11 the California Court of Appeal affirmed the convictions but  
12 remanded for resentencing. Id. at \*16.

14 On May 12, 2008, represented by counsel, Petitioner filed a  
15 petition for review, raising the same issues he raised in his  
16 direct appeal, in the California Supreme Court. The California  
17 Supreme Court summarily denied the petition on July 23, 2008.  
18 Respondent's Ex. 3.

20 On May 24, 2012, Petitioner filed a habeas petition in the  
21 Alameda County Superior Court, asserting that he had new evidence  
22 that proved his actual innocence of Counts 6, 7 and 8, forcible  
23  
24  
25  
26  
27  
28

1 rape, forcible sodomy and forcible oral copulation.<sup>3</sup> Respondent's  
2 Ex. 5. Petitioner attached several documents to his petition.  
3 First, Petitioner attached a declaration from a man named Shelton  
4 Wadsworth, who declared that he had met Petitioner on the prison  
5 yard in 2010. Respondent's Ex. 5. Wadsworth declared that, when  
6 he met Petitioner, he thought Petitioner looked familiar. While  
7 they were talking, Petitioner described his car, a Mercedes Benz.  
8 Wadsworth declared that, after hearing the description of the car,  
9 "right then and there" he remembered how he knew Petitioner.  
10 Wadsworth declared that he remembered Petitioner because he had  
11 seen him five years earlier when Petitioner drove away from a  
12 Motel 6 in Lancaster in a nice car. Wadsworth decided that he  
13 would rob Petitioner because Petitioner was alone in the car, so  
14 he followed Petitioner to a car wash and then to a Sprint store.  
15 Wadsworth declared that that evening, he saw Petitioner again in  
16 Palmdale and followed him to a different Motel 6 in Palmdale.  
17 Wadsworth saw a woman get out of Petitioner's car and go into the  
18 office. The woman returned to the car and Petitioner drove to  
19 park by a room. The woman and Petitioner went into the room.  
20 Wadsworth parked next to Petitioner's car and waited for over an  
21  
22  
23

---

24 <sup>3</sup> Respondent notes that, between 2010 and 2013, Petitioner  
25 filed multiple pro se petitions in the Alameda County Superior  
26 Court, the California Court of Appeal and the California Supreme  
27 Court. See Respondent's Ex. 4. However, none of those petitions  
28 was attached to the instant federal habeas petition, nor does  
Petitioner argue that they are relevant to the instant petition or  
that they tolled the federal statute of limitations.

1 hour, when another car drove up. The woman came out of the room  
2 and greeted the two girls in the car. Wadsworth stated that the  
3 woman and the girls were initially in a good mood but had some  
4 sort of argument. Wadsworth declared that Petitioner later showed  
5 him a photograph of Amitha, and he was "100% sure" the woman in  
6 the picture was the woman he saw leaving the motel room five years  
7 earlier.

8  
9 Petitioner also submitted a purported receipt for a room at a  
10 Motel 6 in Palmdale for the night of March 23, 2005 in Amitha's  
11 name as well as a purported receipt for a room at the Motel 6 in  
12 Lancaster for the night of March 22, 2005 in Petitioner's name.  
13 Petitioner also submitted a declaration stating that he was  
14 recanting his trial testimony that he had driven Amitha to a motel  
15 in Lancaster. Instead, he declared, he took Amitha to a motel in  
16 Palmdale.

17  
18 In addition, Petitioner submitted a letter from a private  
19 investigator describing an August 6, 2010 conversation with Anita  
20 Suri. The investigator stated that he had a list of questions he  
21 was to ask regarding Petitioner's case, but that he did not know  
22 the context of the questions. Among other things, the private  
23 investigator wrote that Suri told him that she had seen Amitha at  
24 a Motel 6 "on Palmdale Boulevard" on an unspecified date and that  
25 Amitha had not appeared to be injured or upset at the time.  
26 Finally, Petitioner submitted a typed letter, purportedly sent by  
27 Amitha to Petitioner's mother. The letter expressed remorse about  
28

1 Petitioner and stated that Amitha lied about Petitioner forcing  
2 her to have sex and hitting her because she was scared of her  
3 parents.

4 On July 23, 2012, Judge Horner of the Alameda County Superior  
5 Court denied the petition for habeas corpus "for failure to state  
6 a prima facie case for relief." Respondent's Ex. 6. A footnote  
7 to the order stated, "The 'declarations' submitted in support of  
8 the Petition are not originals." Id.

9  
10 On November 1, 2012 Petitioner filed an amended habeas  
11 petition in the Alameda County Superior Court, reiterating his  
12 claim of actual innocence and raising for the first time an  
13 ineffective assistance of counsel claim, alleging that trial  
14 counsel was ineffective for failing to investigate and discover  
15 the evidence of Petitioner's actual innocence. At the bottom of  
16 the purported letter from Amitha, mailed to his mother, Petitioner  
17 typed,  
18

19 On May 24, 2012 the superior court of Alameda County  
20 denied the state habeas corpus per case #150971 because  
21 petitioner did not send the original letter of Amitha []  
22 in support of the petition. I Demetrois T. Dixon  
23 declare under the penalty of perjury that the above is  
24 in fact the original letter of Amitha [].

25 Respondent's Exhibit 7. Below the statement is Petitioner's  
26 notarized signature.

27 On January 15, 2013, Petitioner filed a motion to amend his  
28 petition. Petitioner asserted that his investigator had  
interviewed Suri's mother, Neena Suri, in November 2012, and that  
Neena Suri told the investigator that she had hosted a party for

1 her daughter and some of her friends in March 2005. Neena Suri  
2 also purportedly stated that Amitha attended the party and did not  
3 appear to have any injuries.

4 On March 29, 2013, Judge Horner denied the amended habeas  
5 petition, stating,

6 The Petition is denied as untimely. Petitioner  
7 fails to establish that he diligently pursued his  
8 claims, fails to establish good cause for the  
9 substantial delay, and fails to establish that either of  
his claims fall within an exception to the untimeliness  
bar.

10 The Petition is also denied for abuse of the writ.  
Respondent's Ex. 9.

11 On June 13, 2013, Petitioner filed another amended habeas  
12 petition in the Superior Court and a challenge to Judge Horner for  
13 cause. Petitioner argued that Judge Horner was biased against him  
14 and questioned Judge Horner's previous ruling. Petitioner argued  
15 that his claims were not untimely and that, if they were, it was  
16 because of his trial counsel's ineffective representation.  
17 Finally, Petitioner resubmitted the purported letter from Amitha,  
18 along with a May 22, 2013 declaration from his mother, stating  
19 that in February 2012, she received a telephone call from a  
20 blocked number and that the caller identified herself as Amitha.  
21 The caller told Petitioner's mother that she couldn't talk but  
22 that she felt very bad about what happened to Petitioner and that  
23 she would write a letter explaining herself. Petitioner's mother  
24 declared that she received the letter a week later. Respondent's  
25 Ex. 10.

1 In an order dated August 2, 2013, Judge Horner denied the  
2 challenge for cause, summarily denied the amended habeas petition  
3 and advised Petitioner that he could file a habeas petition in the  
4 Court of Appeal. Respondent's Ex. 11.

5 On October 21, 2013, Petitioner filed a further amended  
6 habeas petition in the Superior Court and, on November 13, 2013,  
7 he filed supplemental materials in support of the petition.<sup>4</sup> On  
8 December 19, 2013, Judge Horner denied the further amended  
9 petition as "an abuse of the writ." Respondent's Ex. 12. Judge  
10 Horner noted that Petitioner's only new evidence and argument was  
11 evidence regarding Hindu culture and argument that Amitha was  
12 motivated to lie about her sexual activity to avoid being disowned  
13 by her Hindu parents. Judge Horner further noted that a habeas  
14 petitioner is required to present all of his claims in a single  
15 petition and that presenting previously presented claims in  
16 subsequent petitions is generally an abuse of the writ. Finally,  
17 Judge Horner noted that Petitioner's purported evidence of his  
18 innocence was not reliable. Judge Horner found that Petitioner's  
19 re-litigation of his actual innocence claim was an abuse of the  
20 writ.  
21 writ.

22  
23 In January 2014, Petitioner filed a habeas petition in the  
24 California Court of Appeal. Respondent argued that the claims had  
25

---

26 <sup>4</sup> Neither Petitioner nor Respondent filed a copy of this  
27 petition. However, the Superior Court described the petition in  
28 its order denying it. Petitioner does not dispute the  
characterization of the petition.



1 been properly denied and also presented a declaration from Amitha,  
2 stating that she had never recanted her testimony and that she had  
3 not written the letter filed by Petitioner nor had she ever called  
4 his mother. On June 30, 2013, the Court of Appeal summarily  
5 denied the petition. On July 8, 2014, Petitioner filed a petition  
6 for habeas relief with the Supreme Court of California. The  
7 Supreme Court summarily denied review on September 10, 2014.

8  
9 Petitioner filed the instant petition, raising a claim of  
10 actual innocence<sup>5</sup>, on November 17, 2014.

#### 11 LEGAL STANDARD

12 The Antiterrorism and Effective Death Penalty Act of 1996  
13 (AEDPA) imposes a statute of limitations on petitions for a writ  
14 of habeas corpus filed by state prisoners. Petitions filed by  
15 prisoners challenging non-capital state convictions or sentences  
16 must be filed within one year of the latest of the date on which:

17  
18 (A) the judgment became final after the conclusion of  
19 direct review or the time passed for seeking direct  
review;

20 (B) an impediment to filing an application created by  
21 unconstitutional state action was removed, if such  
action prevented the petitioner from filing;

22 (C) the constitutional right asserted was recognized by  
23 the Supreme Court, if the right was newly recognized by

24  
25 <sup>5</sup> The initial federal habeas petition appears to raise a  
26 claim of ineffective assistance of counsel, but Petitioner's  
27 response to the motion to dismiss states that "he has not raised  
28 ineffective assistance of counsel." Docket No. 20 at 16. The  
Court's finding that the petition is untimely also applies to any  
ineffective assistance of counsel claim as well.

1 the Supreme Court and made retroactive to cases on  
2 collateral review; or

3 (D) the factual predicate of the claim could have been  
4 discovered through the exercise of due diligence.

5 28 U.S.C. § 2244(d)(1).

6 The one-year statute of limitations is tolled under  
7 § 2244(d)(2) for the "time during which a properly filed  
8 application for State post-conviction or other collateral review  
9 with respect to the pertinent judgment or claim is pending." 28  
10 U.S.C. § 2244(d)(2). Absent any tolling, the expiration date of  
11 the limitations period will be the same date as the triggering  
12 event in the following year. Patterson v. Stewart, 251 F.3d 1243,  
13 1246 (9th Cir. 2001).

#### 14 DISCUSSION

##### 15 I. Timeliness

16 Petitioner's state judgment became final on October 21, 2008,  
17 ninety days after July 23, 2008, when the California Supreme Court  
18 denied review of the California Court of Appeal's decision on his  
19 direct appeal. See Bowen v. Roe, 188 F.3d 1157 (9th Cir. 1999)  
20 (direct review includes the ninety day period in which to file a  
21 petition for writ of certiorari in the United States Supreme  
22 Court). Petitioner argues that he did not discover the factual  
23 predicate for his actual innocence claim until approximately  
24 March 7, 2012, when he learned of the purported letter from Amitha  
25 to his mother recanting her trial testimony. He also argues that  
26  
27  
28

1 the statute of limitations was tolled following his discovery  
2 while he filed his various state habeas petitions.

3 The Court finds, as the state court found, that the purported  
4 letter from Amitha to Petitioner's mother is not reliable newly  
5 found evidence. Indeed, Respondent produced a declaration from  
6 Amitha stating that she "did not write or sign" the letter and  
7 that she "never telephoned Mr. Dixon's mother." Respondent's Ex.  
8 15. Accordingly, the Court finds that the letter was not evidence  
9 sufficient to delay commencement of the AEDPA statute of  
10 limitations.  
11

12 Even if the purported letter from Amitha to Petitioner's  
13 mother were newly discovered evidence sufficient to delay  
14 commencement of the one-year statute of limitations to March 7,  
15 2012, the Court finds that the petition, filed on November 17,  
16 2014, was not timely. On March 29, 2013, the Alameda County  
17 Superior Court denied Petitioner's amended state habeas petition,  
18 finding that it was untimely and an abuse of the writ. As noted  
19 above, the AEDPA statute of limitations is only tolled for the  
20 "time during which a properly filed application for State post-  
21 conviction or other collateral review with respect to the  
22 pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2)  
23 (emphasis added). Petitioner's untimely amended state habeas  
24 petition was not "properly filed" for purposes of § 2244(d)(2).  
25  
26 See Pace v. DiGuglielmo, 544 U.S. 408, 410 (2005) ("a state  
27 postconviction petition rejected by the state court as untimely"  
28

1 is not "properly filed"); see also Bonner v. Carey, 425 F.3d 1145,  
2 1149 (9th Cir. 2005) (petition dismissed as untimely by California  
3 court is not "properly filed"). Moreover, Petitioner did not  
4 challenge in the Court of Appeal the Superior Court's finding of  
5 untimeliness. Instead, Petitioner filed further amended petitions  
6 in the Superior Court on June 13, 2013 and October 21, 2013, which  
7 were denied as abuses of the writ.

8  
9 Accordingly, the Court finds that Petitioner's federal habeas  
10 petition was not timely filed.

11 II. Actual Innocence

12 Petitioner also argues that he is entitled to federal review  
13 of his petition because his underlying claim of actual innocence  
14 is meritorious. In McQuiggin v. Perkins, 133 S. Ct. 1924, 1928  
15 (2013), the Supreme Court addressed the actual innocence gateway  
16 established in Schlup v. Delo, 513 U.S. 298 (1995), and held that  
17 "actual innocence, if proved, serves as a gateway through which a  
18 petitioner may pass" allowing federal habeas review even if the  
19 petition was filed outside of the statute of limitations.

20  
21 However, for the Schlup "actual innocence" gateway to apply, "a  
22 petitioner must show that, in light of all the evidence, including  
23 evidence not introduced at trial, 'it is more likely than not that  
24 no reasonable juror would have found petitioner guilty beyond a  
25 reasonable doubt.'" Majoy v. Roe, 296 F.3d 770, 776-77 (9th Cir.  
26 2002)(quoting Schlup, 513 U.S. at 327).

1 The Supreme Court has cautioned that "tenable actual-  
2 innocence gateway pleas are rare." McQuiggin, 133 S. Ct. at 1928;  
3 see also House v. Bell, 547 U.S. 518, 538 (2006) ("the Schlup  
4 standard is demanding and permits review only in the  
5 'extraordinary' case"). Claims of actual innocence must be  
6 supported by "new reliable evidence--whether it be exculpatory  
7 scientific evidence, trustworthy eyewitness accounts, or critical  
8 physical evidence--that was not presented at trial. Because such  
9 evidence is obviously unavailable in the vast majority of cases,  
10 claims of actual innocence are rarely successful." Schlup, 513  
11 U.S. at 324.

12  
13 The evidence produced by Petitioner is not reliable.  
14 Moreover, even if taken as true, none of the evidence, except the  
15 purported letter by Amitha, would prove Petitioner's innocence.  
16 The declaration of Shelton Wadsworth is credible on its face. He  
17 declared that, after hearing Petitioner describe his car, he  
18 remembered that he had seen Petitioner five years earlier,  
19 intended to rob him, and followed him around Lancaster and  
20 Palmdale, California. Wadsworth also declared that, after seeing  
21 a photograph of Amitha, he was sure that he had seen her leave a  
22 motel room, uninjured, on that day five years earlier. Even if  
23 this declaration were deemed reliable and Wadsworth had seen  
24 Amitha leave a motel room, uninjured on an unspecified date, that  
25 fact would not prove that Petitioner had never raped or injured  
26 Amitha.  
27  
28

1       Petitioner argued that the two unauthenticated motel receipts  
2 showed that he did not rape Amitha, because she only went to a  
3 motel room that she herself had rented. Even if taken as true,  
4 the fact that Amitha might have rented the motel room would not  
5 prove that Petitioner never raped or injured her. Similarly, even  
6 if Anita Suri's and Neena Suri's statements are assumed to be  
7 true, their recollections of Amitha's condition on unspecified  
8 dates do not prove that Petitioner never raped or injured Amitha.  
9

10       The only document produced by Petitioner that, if credible,  
11 could reasonably call into question his guilt is the purported  
12 letter from Amitha. However, that letter is wholly unreliable.  
13 Petitioner first presented the letter without authentication. He  
14 later attempted to authenticate it himself and, only after the  
15 letter was twice rejected by the state court, did he present the  
16 declaration from his mother stating that she received the letter  
17 in the mail and that Amitha had called her, telling her to expect  
18 the letter. As noted above, Respondent produced a declaration by  
19 Amitha stating that she did not call Respondent's mother and she  
20 neither wrote nor signed the purported letter disavowing her trial  
21 testimony. Accordingly, Petitioner's claim of actual innocence  
22 does not excuse the untimely filing of his federal habeas  
23 petition.  
24

25  
26                   CERTIFICATE OF APPEALABILITY

27       A habeas petitioner must be granted a certificate of  
28 appealability in order to appeal. See Rule 11(a) of the Rules



1 Governing § 2254 Cases, 28 U.S.C. foll. § 2254 (requiring district  
2 court to rule on certificate of appealability in same order that  
3 denies petition). A certificate of appealability should be  
4 granted "only if the applicant has made a substantial showing of  
5 the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).  
6 Where a petition is dismissed on procedural grounds, as it is  
7 here, granting a certificate of appealability has two components:  
8 "one directed at the underlying constitutional claims and one  
9 directed at the district court's procedural holding." Slack v.  
10 McDaniel, 529 U.S. 473, 484-85 (2000). "When the district court  
11 denies a habeas petition on procedural grounds without reaching  
12 the prisoner's underlying constitutional claim, a COA should issue  
13 when the prisoner shows, at least, that jurists of reason would  
14 find it debatable whether the petition states a valid claim of the  
15 denial of a constitutional right and that jurists of reason would  
16 find it debatable whether the district court was correct in  
17 its procedural ruling." Id. at 484.

18  
19  
20 The application of the procedural rule in this case is not  
21 debatable. Even if the purported letter from Amitha to  
22 Petitioner's mother was newly discovered evidence sufficient to  
23 delay commencement of the one-year statute of limitations to March  
24 7, 2012, the federal habeas petition was untimely. Moreover, the  
25 purported evidence of actual innocence was unreliable. A  
26 certificate of appealability is denied. Petitioner may request a  
27 certificate of appealability from the Court of Appeals.  
28

CONCLUSION

For foregoing reasons, the Court orders as follows:

1. Respondent's motion to dismiss is GRANTED. (Docket No. 14)
2. A Certificate of Appealability is DENIED.
3. Petitioner's motion for an evidentiary hearing and for appointment of counsel is DENIED as moot (Docket No. 21).

The Clerk of the Court shall enter judgment and close the file.

IT IS SO ORDERED.

Dated: 3/31/2016

  
CLAUDIA WILKEN  
United States District Judge